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IN THE COURT OF APPEALS OF INDIANA

SHAKA SHAKUR,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 45A05-0702-PC-96
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAKE SUPERIOR COURT
The Honorable Thomas Stefaniak, Judge
Cause No. 45G02-0506-PC-6

October 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following Shaka Shakur's four convictions and habitual offender adjudication arising out of an incident during which he shot at a police cruiser, injured an officer, and led police on a high-speed automobile chase, Shakur appeals the post-conviction court's denial of his petition for post-conviction relief. Specifically, Shakur raises several issues, which we restate as (1) whether the trial court committed fundamental error when it gave certain jury instructions, (2) whether statements made by the prosecutor during closing argument constituted fundamental error, and (3) whether Shakur was denied effective assistance of trial and appellate counsel. Shakur's freestanding claims of error are unavailable on post-conviction review. Further, we conclude that trial and appellate counsels' performances were not ineffective. We therefore affirm the post-conviction court.

Facts and Procedural History

While traveling in his car in Gary, Indiana, on January 7, 2002, Shakur struck a light pole and continued driving. Officer Richard Allen of the Gary Police Department conducted a traffic stop, and Shakur exited his vehicle and began shooting at the officer. After firing more than twenty bullets and hitting the windshield, hood, and front portion of the patrol car, injuring Officer Allen with the shattering glass, Shakur led the officer on a high-speed chase, which ended when Shakur's car crashed into a school bus, spun, and hit a tree.

A jury convicted Shakur of attempted murder, a Class A felony, attempted battery by means of a deadly weapon, a Class C felony, resisting law enforcement while using a

deadly weapon, a Class D felony, and resisting law enforcement using a motor vehicle, a Class D felony. Shakur then pled guilty to being a habitual offender. Shakur appealed, and we affirmed in part and reversed in part. *Shakur v. State*, No. 45A04-0307-CR-323 (Ind. Ct. App. May 28, 2004). Specifically, we reversed his attempted battery conviction because the attempted battery was a lesser-included offense of attempted murder, *id.*, slip op. at 7-8, and we reversed one of his resisting law enforcement convictions after finding that only one continuous act of resisting law enforcement had occurred. *Id.*, slip op. at 8-9. We also directed the trial court *sua sponte* to revise its sentencing order to attach his habitual offender enhancement to a sentence. *Id.*, slip op. at 9 n.9.

Shakur filed a petition for post-conviction relief on May 27, 2005, later amended,[1] alleging that the trial court improperly instructed the jury regarding attempted murder, the applicable mens rea, and the doctrine of reasonable doubt and that the prosecutor committed misconduct during closing argument. Further, he argued that he was denied the effective assistance of trial counsel because of counsel's failure to object to these alleged errors, counsel's failure to advise the State that he would accept a twelve-year sentence, and counsel's failure to request a redacted form of an exhibit reflecting the defendant's criminal past.[2] Shakur argued that he received ineffective assistance of appellate counsel because of counsel's failure to raise the first two of these issues and

[1] Neither the original nor the amended petition for post-conviction relief is included in the Appellant's Appendix. We use the post-conviction court's Findings of Fact and Conclusions of Law to glean the arguments raised in the petition.

[2] Shakur's petition for post-conviction relief contained a number of allegations of trial counsel ineffectiveness, but these are the only allegations raised on appeal.

allege ineffectiveness of trial counsel on direct appeal. After conducting a hearing, the post-conviction court denied the petition. Shakur now appeals.

Discussion and Decision

Shakur appeals the denial of post-conviction relief. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5). The post-conviction court is the sole judge of the evidence and the credibility of witnesses. *Hall v. State*, 849 N.E.2d 466, 468 (Ind. 2006). When appealing the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. *Fisher v. State*, 810 N.E.2d 674, 679 (Ind. 2004). The reviewing court will not reverse the judgment unless the evidence unerringly and unmistakably leads to the opposite conclusion. *Patton v. State*, 810 N.E.2d 690, 697 (Ind. 2004). Pursuant to Indiana Post-Conviction Rule 1(6), the post-conviction court issued findings of fact and conclusions of law. We will reverse a post-conviction court's findings and judgment only upon a showing of clear error, which is that which leaves us with a definite and firm conviction that a mistake has been made. *Hall*, 849 N.E.2d at 468. Such deference is not given to conclusions of law, which are reviewed *de novo*. *Chism v. State*, 807 N.E.2d 798, 801 (Ind. Ct. App. 2004).

We begin by noting that Shakur raises several freestanding claims of error, which he argues are fundamental error. The Indiana Supreme Court has expressly held that fundamental error claims are not available in post-conviction proceedings. *Sanders v. State*, 765 N.E.2d 591, 591 (Ind. 2002). In post-conviction proceedings, claims that are

known and available at the time of direct appeal, but are not argued, are waived. *Timberlake v. State*, 753 N.E.2d 591, 597 (Ind. 2001). They cannot be subsequently raised in the post-conviction setting. *Reed v. State*, 856 N.E.2d 1189, 1193-94 (Ind. 2006). Shakur's claims of jury instruction error and prosecutorial misconduct were known and available to him on direct appeal and are therefore waived.

An exception to the waiver rule, however, is the argument that a defendant was deprived of the right to effective counsel as guaranteed by the Sixth Amendment to the United States Constitution. *See Sanders*, 765 N.E.2d at 592. This claim may be raised for the first time in a petition for post-conviction relief. *Woods v. State*, 701 N.E.2d 1208, 1210 (Ind. 1998). We therefore proceed to address Shakur's arguments regarding the performance of his trial and appellate counsel. We review the effectiveness of trial and appellate counsel under the two-part test provided by *Strickland v. Washington*, 466 U.S. 668 (1984). *Bieghler v. State*, 690 N.E.2d 188, 192-93 (Ind. 1997). A claimant must demonstrate that counsel's performance fell below an objective level of reasonableness based upon prevailing professional norms and that the deficient performance resulted in prejudice. *Strickland*, 466 U.S. at 687-88. "Prejudice occurs when the defendant demonstrates that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Grinstead v. State*, 845 N.E.2d 1027, 1030 (Ind. 2006) (quoting *Strickland*, 466 U.S. at 694).

I. Shakur's Claims About Trial Counsel

A. Failure to Object to Jury Instructions

Shakur argues that his trial counsel was ineffective for failing to object to three final jury instructions. The disputed instructions read as follows:

Final Instruction #9:

> ATTEMPTED MURDER, as alleged in Count I of the Charging Information, is defined by statute in Indiana in pertinent part as follows:
>
> A person who intentionally attempts to kill another human being, commits Attempted Murder, a Class A Felony.
>
> To convict the defendant of the crime of Attempted Murder, the State must have proved each of the following elements beyond a reasonable doubt:
>
> 1. The defendant
> 2. with intent to kill
> 3. intentionally
> 4. attempted to kill another human being, to-wit: Officer Richard Allen, Sr.
> 5. by shooting at Officer Richard Allen, Sr. with a handgun, a deadly weapon.

Appellant's App. p. 16.

Final Instruction #13:

> A person engages in conduct "intentionally" if, when he engages in the conduct it [is] his conscious objective to do so. A person engages in conduct "knowingly" if, when he engages in that conduct, he is aware of a high probability that he is doing so.

Id.

Final Instruction #15:

> The doctrine of reasonable doubt is a practical rule of law to guide you in your jury duty. It means that no person charged with a crime for which he is on trial shall be convicted until the evidence in the case establishes his guilt beyond a reasonable doubt. A "reasonable doubt" is a fair, actual and

> logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation.
>
> If after considering all of the evidence, you have reached such a firm belief in the guilt of the defendant that you would feel safe to act upon that conviction, without hesitation, in a matter of the highest concern and importance to you, when you are not required to act at all, then you will have reached that degree of certainty which excludes reasonable doubt and authorizes conviction.
>
> That rule of law which requires proof of guilt beyond a reasonable doubt applies to each juror individually. Each of you must refuse to vote for conviction unless you are convinced beyond a reasonable doubt of the defendant's guilty. You[r] verdict must be unanimous.

Id. at 16-17.

Shakur argues that "[n]either Instruction No. 9 nor Instruction No. 13 met the requirement that the jury must be instructed that the State must prove by a reasonable doubt that the Defendant acted with 'specific intent', and took a substantial step towards [sic] killing a human being. It is reversible error for the trial court to fail to so instruct a jury." Appellant's Br. p. 9 (citing *Spradlin v. State*, 569 N.E.2d 950 (Ind. 1999)). We find no error. Here, Final Instruction 9 clearly instructed the jury that it was to determine whether Shakur specifically intended to kill Officer Allen ("The defendant . . . with intent to kill . . . intentionally . . . attempted to kill another human being, to-wit: Officer Richard Allen, Sr. . . . by shooting at Officer Richard Allen, Sr. with a handgun, a deadly weapon."). Additionally, "[w]e do not consider instructions in isolation or as single units; rather, we read instructions together and construe them as a whole." *Conner v. State*, 711 N.E.2d 1238, 1247 (Ind. 1999) (citing *Hurt v. State*, 570 N.E.2d 16, 18 (Ind. 1991); *Kirland v. State*, 43 Ind. 146, 154 (1873)). Although Shakur does not cite it, Final

Instruction 8 expressly instructed the jury that attempt requires a "substantial step." Final Instruction 8 reads in relevant part: "ATTEMPT: A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a *substantial step toward the commission of the crime*." Appellee's Br. p. 11.[3] We find that the Final Instructions correctly informed the jury of the elements of attempted murder. When evaluating whether trial counsel was ineffective for failing to object to a jury instruction, we examine whether the objection would have been successful. *See Sanchez v. State*, 675 N.E.2d 306, 311 (Ind. 1996). Where, as here, the instructions correctly embodied the law, the trial court would not likely have sustained an objection, and a failure to object does not constitute deficient performance. *Id.*

Shakur's argument regarding Final Instruction 15 is somewhat different. Trial counsel did, in fact, timely object to the use of this instruction and argue the issue to the court. The objection, however, focused upon language regarding unanimity in reaching a verdict. Shakur does not allege that his trial counsel was ineffective in her handling of this particular objection. Appellant's Br. p. 7, 18.

Instead, Shakur argues that Final Instruction 15 "allowed jurors to find [him] guilty upon a degree of proof below the 'beyond a reasonable doubt standard' as required by due process" and that his attorney should have objected on this ground. *Id*. at 18. We disagree. Almost identical instructions have been held constitutionally sufficient. *Waibel v. State*, 808 N.E.2d 750, 760 (Ind. Ct. App. 2004), *trans. denied* (citing *Winegeart v.*

[3] The final instructions were not included in the Appellant's Appendix.

State, 665 N.E.2d 893, 903 (Ind. 1996)); *see also Morgan v. State*, 755 N.E.2d 1070, 1073 (Ind. 2001) (Reviewing a very similar instruction for a different alleged error, the Court wrote, "[W]e have not disapproved its use," and found that "it was within the range of reasonable attorney behavior not to object to th[is] instruction[]."). In *Winegeart*, our Supreme Court evaluated and rejected a defendant's nearly identical claim that "the words 'actual' and 'fair' expand the quantum of doubt needed to constitute 'reasonable' doubt, and that the [challenged] instruction refer[red] to 'moral certainty' instead of 'evidentiary certainty,' thus authorizing the jury to find guilt based on a degree of proof below that required by the Due Process Clause." *Winegeart*, 665 N.E.2d at 896. The Court concluded, "While the challenged instruction in the present case is less effective than we would prefer, it is not so deficient as to be constitutionally defective. We therefore reject the defendant's contention of reversible error regarding the trial court's reasonable-doubt instruction." *Id.* at 902-03. Final Instruction 15 is therefore a correct statement of the law regarding reasonable doubt, and trial counsel was not ineffective for failing to raise the argument Shakur now makes.

We note, however, the *Winegeart* majority's suggestion that a better reasonable doubt instruction was the Federal Judicial Center's Pattern Criminal Jury Instruction 21 (1987). *Id.* at 902. The majority then requested that this instruction be added to the next revision of the Indiana Pattern Jury Instructions. *Id.* Aspects of this recommended instruction are now incorporated into Indiana Pattern Jury Instruction—Criminal 1.15 (3d ed. 2006). Thus, *Winegeart*'s critique of the reasonable doubt pattern instruction is inapplicable to Indiana's present pattern jury instruction. As the present pattern

instruction regarding reasonable doubt integrates the formulation advocated by *Winegeart*, we recommend that trial courts utilize this pattern instruction.

B. Failure to Object to Prosecutor's Remarks

Shakur next argues that his trial counsel was ineffective for failing to object to remarks made by the prosecutor during closing argument, failing to request an admonishment, and failing to move for a mistrial. During closing argument, the following exchange occurred:

> BY [DEPUTY PROSECUTOR]: If you can find him to be insane at the time of the offense you can let him out. He goes back to the streets. But if he is still insane –
> BY [DEFENSE COUNSEL]: That's a mischaracterization of the law.
> THE COURT: Ladies and gentlemen of the jury, I'll instruct you as to the consequences if you were to so find. The Court's instructions are the best source of the applicable law on that issue. You may continue.
> BY [DEPUTY PROSECUTOR]: Here's the reason how it relates: Because if he can be sane now, that goes into how he gets back out on the streets.

Appellant's App. p. 39.

We begin by noting that defense counsel *did* object to the initial portion of the prosecutor's statement of the law of insanity. To the extent that the defendant argues that his trial counsel was ineffective for failing to object to the second portion of the prosecutor's remarks, we observe that the defendant has not provided us with the page following these remarks which would tell us whether a continuing objection or a motion for a mistrial was made.

Assuming *arguendo* that a continuing objection was not lodged, Shakur has not presented any argument in his appellate brief regarding how these statements by the prosecutor constituted error, Appellant's Br. p. 13-15, 18, and has therefore failed to

carry his burden to show that defense counsel performed deficiently. Further, even if the prosecutor's remarks were in error, the trial court immediately admonished the jury. "Generally, a timely and accurate admonition is an adequate curative measure for any prejudice that results from an improper comment made by a prosecutor." *Donnegan v. State*, 809 N.E.2d 966, 974 (Ind. Ct. App. 2004), *trans. denied*; *see also Schlomer v. State*, 580 N.E.2d 950, 957 (Ind. 1991) ("An admonition is presumed to be sufficient to protect the defendant's rights and to remove any prejudice."). Because Shakur has shown neither deficiency nor prejudice arising out of this exchange, trial counsel was not ineffective in this regard.

C. Failure to Convey Defendant's Acceptance of Plea

Shakur contends that his trial counsel was ineffective for failing to communicate to the State his acceptance of a plea bargain calling for a twelve-year sentence. He argues that he informed his attorney on the day of trial that although he preferred a sentence of ten years, he would accept a plea agreement providing for twelve.

The post-conviction court made a factual finding, however, that although "the petitioner, on the morning of trial, reconsidered his prior rejection of the twelve-year plea offer and wished to accept it," "the plea negotiations concerning a fixed, twelve-year plea occurred *prior* to trial." Appellant's App. p. 19 (emphasis added). This finding is supported by the record. During the post-conviction hearing, the prosecutor testified that the State's twelve-year plea offer was available "pretrial" and clarified, "this is in the days before the trial began, like a week or so before. Once trial came, I was not discussing negotiations . . . ." Tr. p. 57-58. Further, in response to the question, "Was

this case negotiated the Friday before or the first day of trial?," the prosecutor answered, "No." *Id.* at 66-67. Indeed, "a prosecutor is under no duty to plea bargain at all, or to keep an offer open, as the offer remains within the discretion of the prosecutor." *Roeder v. State*, 696 N.E.2d 62, 64 (Ind. Ct. App. 1998) (citing *Coker v. State*, 499 N.E.2d 1135, 1138 (Ind. 1986), *reh'g denied*). Thus, the post-conviction court did not clearly err in determining that the twelve-year offer was unavailable to Shakur on the morning of trial, and Shakur suffered no prejudice by his counsel's failure to communicate his wishes to the State on that date.

D. Failure to Request a Redaction

Finally, Shakur argues that his trial counsel was ineffective for failing to request that State's Exhibit 93 be redacted prior to entering the jury room with the jury for deliberations. This argument is waived because Shakur failed to raise it before the post-conviction court. Issues that are not raised in a petition for post-conviction relief cannot be raised for the first time on appeal. P-C.R. 1(8); *Allen v. State*, 749 N.E.2d 1158, 1171 (Ind. 2001).

II. Shakur's Claims About Appellate Counsel

Shakur alleges that his appellate counsel was ineffective for failing to raise the following issues: ineffective assistance of trial counsel, fundamental error arising out of Final Instructions 9, 13, and 15, and fundamental error arising out of the prosecutor's comments during closing argument. When evaluating an ineffective assistance of appellate counsel claim for failure to raise issues that should have been raised on appeal, we will only find deficient performance where "the omitted issues were significant,

obvious, and clearly stronger than those presented." *Wrinkles v. State*, 749 N.E.2d 1179, 1203 (Ind. 2001) (citation omitted). Appellate counsel is not ineffective for failing to raise issues that are unlikely to succeed. *See Trueblood v. State*, 715 N.E.2d 1242, 1259 (Ind. 1999), *reh'g denied*.

Here, the issues Shakur argues are not "significant, obvious, and clearly stronger" than the issues raised by his appellate counsel on direct appeal, which led to the reversal of two of his convictions. Rather, we have addressed all of his arguments but one and concluded that none warrants relief. Where we determine that a defendant did not receive ineffective assistance of trial counsel, the defendant "can neither show deficient performance nor resulting prejudice as a result of his appellate counsel's failure to raise [the] argument[s] on appeal." *Davis v. State*, 819 N.E.2d 863, 870 (Ind. Ct. App. 2004), *trans. denied*. The one argument unique to Shakur's ineffectiveness of appellate counsel claim is that his trial counsel was ineffective for failing to object to that language "Your verdict must be unanimous," found in Final Instruction 15. We initially note that Shakur failed to provide any argument regarding how this issue was clearly stronger than the issues raised on direct appeal. Appellant's Br. p. 21. Additionally, the post-conviction court found that appellate counsel did not raise this issue on direct appeal because he did not believe that the instruction was erroneous. Appellant's App. p. 20. Appellate counsel was correct that this was an accurate statement of the law. We disagree with the defendant's contention that "Your verdict must be unanimous" is vague and creates "a presumption that a juror cannot maintain a vote of not guilty since the jury as a whole is directed to reach an unanimous verdict." Appellant's Br. p. 13. Rather, the sentence is

clear and immediately follows another sentence that instructs jurors not to vote for conviction unless convinced beyond a reasonable doubt that the defendant was guilty. Appellant's App. p. 17. Shakur's appellate counsel was not ineffective.

Shakur's freestanding claims of error are unavailable on post-conviction review. His trial counsel's failure to object to certain jury instructions and communicate Shakur's untimely desire to enter into a plea bargain do not constitute ineffective assistance of counsel. Further, appellate counsel was not deficient in failing to raise these issues on direct appeal. The evidence does not unmistakably and unerringly lead to a conclusion contrary to the post-conviction court.

Judgment affirmed.

BAKER, C.J., and BAILEY, J., concur.